No. 48888-4-II

COURT OF APPEALS
DIVISION II OF THE STATE OF WASHINGTON

STEVEN P. KOZOL, LARRY A. BALLESTEROS, KEITH CRAIG, and KEITH BLAIR,

Appellants,

v.

JPAY, INC.,
a foreign corporation,

Respondent.

REPLY BRIEF OF APPELLANT STEVEN P. KOZOL

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I. SUMMARY OF ARGUMENT

Pursuant to RAP 10.1(g), Appellant Kozol hereby incorporates and adopts the summary of argument presented in Section I of the Reply Brief of Appellants Ballesteros, Craig and Blair.

II. REPLY ARGUMENT AND LEGAL AUTHORITY

A. This Case Is Not About A Product Warranty

Pursuant to RAP 10.1(g), Appellant Kozol hereby incorporates and adopts the arguments presented in Section II(A) of the Reply Brief of Appellants Ballesteros, Craig and Blair.

B. U.C.C. or Breach of Contract Claims Are Not At Issue

Pursuant to RAP 10.1(g), Appellant Kozol hereby incorporates and adopts the arguments presented in Section II(B) of the Reply Brief of Appellants Ballesteros, Craig and Blair.

C. Consumer Protection Act Violations

Pursuant to RAP 10.1(g), Appellant Kozol hereby incorporates and adopts the arguments presented in Section II(C) of the Reply Brief of Appellants Ballesteros, Craig and Blair.

D. Injury Under the Consumer Protection Act

Pursuant to RAP 10.1(g), Appellant Kozol hereby incorporates and adopts the arguments presented in Section II(D) of the Reply Brief of Appellants Ballesteros, Craig and Blair.

E. JPay Failed to Establish Beyond Genuine Issue of Fact What Actually "locked" Appellants' JP3 Devices

Pursuant to RAP 10.1(g), Appellant Kozol hereby incorporates and adopts the arguments presented in Section II(E) of the Reply Brief of Appellants Ballesteros, Craig and Blair.

F. Conversion and Trespass to Chattels

Pursuant to RAP 10.1(g), Appellant Kozol hereby incorporates and adopts the arguments presented in Section II(F) of the Reply Brief of Appellants Ballesteros, Craig and Blair.

G. Appellants' Injuries Continue

JPay falsely states in its brief that "Appellants were ultimately provided with JPay's newest model of players, the JP5, and JPay now has records of Appellants downloading the content purchased for their JP3s onto the JP5s and also of Appellants purchasing new downloads." Brief of Respondent, at 6. This is not so.

Appellants Ballesteros and Blair were never provided with new JP5 devices. Each was given a used JP3 that would not fully work. In fact, while JPay has claimed that the Appellants' "locked" JP3s were caused by accidental "software updates" for different JP4 models in May 2015, shortly after Mr. Blair received his refurbished JP3 from JPay in early 2016 (CP 87, ¶ 21) this replacement JP3 again became "locked" and "Unassigned - Property of JPay" upon being plugged into the JPay kiosk. This is important

because it occurred at a time when the JP4s were long discontinued and no longer supported or serviced by JPay, which the company established in December 2015. CP 300-302. Therefore, it could not have been another "software update" for a JP4 model that locked Mr. Blair's newest JP3, as no software updates were being sent to discontinued JP4 players in 2016, and JPay was only honoring 90-day warranties on JP4s up until March 21, 2016, and remedied any problems by providing upgrades to JP5 models. CP 300-302. Because the latest "locking" is identical to Mr. Blair's original "locking" in May 2015, it is a strong indication that the initial problem in May 2015 was not caused by an accidental software update for JP4 devices.

Appellant Ballesteros' "refurbished" JP3 still has downloading problems ever since he received it. He ultimately accepted JPay's offer of a new model device but JPay has never provided one for him.

As for Appellant Kozol, after summary judgment was granted and after the "refurbished" JP3 provided to him (CP 78) stopped working within the first day or two, Mr. Kozol attempted to purchase a brand new JP5 device on the JPay kiosk, just so he could listen to his music. Amazingly, JPay refused to let Mr. Kozol purchase a new JP5. Mr. Kozol's brother Kenny Kozol, a citizen, also tried to purchase a new JP5 for him via the JPay website, but JPay refused, despite other inmates' families being able to purchase them players this way.

Since summary judgment was granted in February 2016, JPay has rolled out its newest model device, a 7-inch touchscreen device called the "JP5 Tablet." Incredibly, JPay's records will show that hundreds of DOC inmates' prior model devices began mysteriously "locking up" and would not function as soon as this tablet model was put on sale, and they were told they had to purchase the newest tablet model at a now considerable price of $169.00. It is patently absurd for JPay to claim it does not make sizable profits from "selling the players themselves." Brief of Respondent, at 5.

Still other predatory commerce abounds, such as inmates who purchased complete albums of music only to get half or two-thirds of the songs to successfully download, and JPay responded to these inmates' help tickets by stating "you got some of the songs, that's good enough" and refuses to provide partial refunds or to remedy the problem.

Finally, despite JPay's refusal to produce requested discovery, Appellants filed numerous help ticket responses from JPay as evidence in this case, obtained directly from inmates who printed them out via the JPay kiosks. But as a result, JPay completely revamped its kiosk system so inmates can no longer print out JPay's responses to use as evidence of JPay's misconduct.

Clearly JPay is out of control. This is a textbook case of tyrannical commerce that Washington's Consumer Protection Act was intended to deter. While Appellants complied with RCW 19.86.095 and served a copy of the Complaint upon the Attorney General's

Office (CP 410, fn.1), perhaps now this Court can request the Attorney General's Office to intervene in a parens patriae capacity.

If this Court doubts the severity of these widespread unfair and deceptive acts, this case should be remanded for a reference hearing. JPay cannot cite to new evidence outside of the record on review and make false representations about Appellants having been made whole. Because JPay has jealously guarded the truth by refusing Appellants' discovery requests, a reference hearing will allow JPay representatives to be called to give evidence about facts material to this case, and Appellants can present the entirety of their evidence into the record showing their injuries continue.

H. Damages Under the Consumer Protection Act

Appellants still have not been made whole as to the ability to use their purchased chattel. They have established actual damages of the purchase costs of the chattel. Also, the doctrine of mitigation of damages does not apply to Appellants under the circumstances in this case. As Washington courts have explained,

> "A wide latitude of discretion must be allowed to the person who by another's wrong has been forced into a predicament where he is faced with a probability of injury or loss. Only the conduct of a reasonable man is required of him. If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen."

Labriola v. Pollard Grp., Inc., 152 Wn.2d 828, 840, 100 P.3d 791 (2004). The effort to mitigate need only appear reasonable and timely in the context of the time in which the decision was made.

Bernson v. Big Bend Elec. Coop., Inc., 68 Wn.App. 427, 435, 842 P.2d 1047 (1993).

The only options at the time of Appellants' injury was JPay's pressure tactic to purchase additional players, or Appellants could seek judicial relief. When JPay offered a remedy after Appellants sued, Appellants were not required to accept inferior JP4 model devices that were being discontinued and would have worsened their position, since the JP4s also began locking up when JPay rolled out the next model JP5 device, and were well-known to be a terrible product.

I. Damages Under Intentional Torts

As a matter of law there is no requirement to mitigate damages under an intentional tort. Appellants have made sufficient showing of emotional distress damages. Mr. Kozol stated his "emotional distress" and "emotional injury" early on. CP 274-276. It was plead in Mr. Kozol's complaint (CP 10:¶ 11, CP 14, 15) and on summary judgment. CP 270-272 (¶ 15). Other Appellants plead emotional distress in their verified complaint (CP 543-554) to which JPay filed no answer. On reconsideration, new evidence was submitted establishing recently occurring emotional distress for JPay's continued actions. CP 164 (¶16), 215 (¶4), 220-221 (¶3), 224 (¶3).

JPay continues to incorrectly argue that Appellants must show "medical/clinical" "real evidence" of their emotional distress. Brief of Respondent, at 10. JPay intentionally misstates the law,

as Appellants' opening briefs cited to controlling cases that held no medical/clinical evidence is required for them to establish emotional distress under intentional torts. Opening Brief of Appellant Kozol, at 17-22. It is not the duty of an appellate court to decide Appellants' emotional damages, only whether they made a sufficient showing to establish damages. Appellants made this sufficient showing as a matter of law. Id. Damages are to be determined by a trier of fact.

J. Declaratory Judgment (UDJA) Claims

JPay's brief presents no argument to rebut Appellants' UDJA claims as to their right under the JPay contract to have music prices be "comparable to itunes" and other retail vendors. Appellants' briefing explains that they are entitled to litigate their UDJA claims. Opening Brief of Appellant Kozol, at 23-30. De novo review shows that there is a justiciable controversy as to whether under DOC Contract No. K8262 inmates are entitled to have the price for any music purchase item be comparable to the price for the same item from itunes or other vendor. In moving for summary judgment JPay failed its initial burden to prove beyond genuine issue that its prices are "comparable to itunes." Appellants' evidence shows that JPay's music prices have been found to be 30% to 50% higher than itunes. Therefore, JPay was not entitled as a matter of law to summary judgment on these claims.

K. Motion for CR 56(f) Continuance

JPay concedes it is unsure of what locked Appellants' devices, but posits that it is "likely" it may have been an inadvertent software update for the JP4 model devices. Brief of Respondent, at 8, 20. Conversely, JPay itself revealed it has the distinct ability to intentionally "malfunction" its digital devices.[4] CP 217, 167. Thus, there is no question viewing JPay's software can show whether it acted to intentionally "malfunction" Appellants' devices. JPay presented no evidence to refute Appellants' expert witness who testified he could determine what actually happened by reviewing the relevant computer code. CP 370-375, 227-230.

If JPay intentionally "malfunctioned" Appellants' devices, this evidence is material to Appellants claims.

L. Motion to Compel Discovery

JPay's brief cites to no controlling case law, court rule, or other authority that establishes it does not have to appear for noted depositions in Washington state.

The only way Appellants can obtain the evidence of what actually occurred with their JP3s "locking" is to depose JPay and review the code commands that are in situ on their JP3 devices.[5]

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[4] JPay standardized "help desk" responses purport that this change cannot be reversed. CP 167. But whether or not this is true has yet to be established via discovery, and viewed in the light most favorable to Appellants, the facts show JPay "unlocked" malfunctioned JP3s in the past. Moreover, whether JPay can reverse a "malfunction" command is different than whether it intentionally malfunctioned Appellants' devices.

[5] Kozol's attorney, Michael Kahrs, has maintined custody of Appellants' JP3s.

JPay failed to seek a protective order, and issued baseless objections to attending depositions. Opening Brief of Appellant Kozol, at 34-40. And JPay failed to actually prove any discovery sought was in fact a protected trade secret under the circumstances. Id., at 40-43.

Because this discovery was the only way Appellants in their specific situation could obtain the material evidence of what actually "locked" their JP3 devices, and because even JPay concedes it is not entirely certain of what happened, Appellants' motion to compel should have been granted.

M. Costs on Appeal

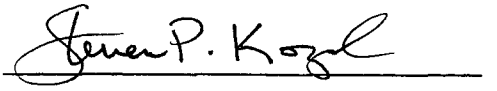
Appellants have two attorneys, Darrell Cochran and Michael Kahrs, who have reviewed the trial pleadings and JPay's Contract, and who intend to enter notices of appearance in this case upon a remand to the trial court, or if necessary at any appellate level. Appellants reserved the right to request fees only in the event that counsel may appear on appeal. Otherwise, if Appellants prevail on appeal they are entitled to an award of all costs on appeal to be determined upon submission of a Cost Bill.

III. CONCLUSION

All of Appellants' arguments are firmly grounded in law and supported by competent evidence. On the other hand, JPay's arguments do not even pass the smell test. For the foregoing reasons, Appellants respectfully request this appeal be granted, that summary judgment be vacated, and that the case be remanded

with instructions for the trial court to grant Appellants' motion for CR 56(f) continuance, and motion to compel discovery.

RESPECTFULLY submitted this 16th day of January, 2017.



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DECLARATION OF SERVICE BY MAIL

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I, LARRY A. BALLESTEROS, declare and say:

That on the 16th day of January, 2017, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 48888-4-II:

Reply Brief of Appellant Kozol;

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addressed to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 16th day of January, 2017, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Signature

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